THE RIGHT TO LOCAL SELF-GOVERNMENT.

IV.

IN no state has this subject received so much judicial consideration as in Michigan. Let us examine therefore the reported cases in this state. The first is People *v.* Mahaney,[1] which affirmed the validity of an act establishing a Board of Police Commissioners for the city of Detroit. The opinion is by Cooley, J., and what he says on p. 500 is worth reading, because in later opinions we shall find how greatly his views changed.

The case of People *v.* Hurlbut[2] is an important one in our study of this subject. While the validity of the act in question was upheld (an act to establish a Board of Public Works), for the reasons and upon the grounds set forth in the opinion, that the appointment was temporary, the note is sounded that in later cases in this court led to the adoption of the principle of the right to local self-government. See the opinion of Christiancy, J., p 66, and especially the extremely able opinion of Cooley, J., pp. 93–113. At p. 108 he sums up thus: "The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away." To make this absolutely complete, let us rather put our proposition in this form: The state may mould local institutions according to its views of policy or expediency, either by general laws, or, at the request of the affected locality, by special act; but local government is matter of absolute right; and the state cannot take it away.

In Board of Park Commissioners *v.* Detroit,[3] we find the principles enunciated by Cooley, J., in the last case bearing fruit. An act of the legislature creating a Board of Park Commissioners for the city of Detroit, the commissioners being appointed by the legislature, was held to be unconstitutional and void. The management of its public parks is the local concern of Detroit, and the legislature cannot interfere in it. Towns and cities, it is recognized, have certain rights to local self-government, even although the constitution be silent on the subject.

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[1] 13 Mich. 481 (1865). [2] 24 Mich. 44 (1871). [3] 28 Mich. 228 (1873).

The case of Park Commissioners *v.* The Mayor[1] is supplementary to the above case, and is to the same effect. In Allor *v.* Wayne County Auditors,[2] the question was what are the rights, powers, and duties of constables. It was held that in Michigan they are local peace officers, ministerial officers of justices of the peace, and bailiffs of courts of record of criminal jurisdiction in the county, and consequently an act of the legislature conferring upon the Metropolitan Police force of Detroit all the common law and statutory power of constables, except for the service of civil process, is, for these and other reasons, illegal and void. At p. 98 Campbell, J., said: —

"The police force is nothing more or less, so far as it is lawfully constituted, than an additional force of constables and watchmen appointed by the state for certain limited purposes; and unless some power exists in the legislature not only to add to the force of local peace officers, but to supersede them entirely for all common-law purposes, the provisions complained of in this statute cannot be maintained, if they are to be construed as respondents construe them."

And at p. 101 he says: —

"Counsel on the argument very properly and very ably placed the right to redress chiefly on the ground that the rights and duties of constables were for many purposes recognized and fixed by our constitutional polity, and so connected with the course of criminal justice as to be beyond legislative annihilation. The argument, although dealing with very ancient affairs, in no sense belongs to mere antiquarian curiosity. It is very unfortunate and very discreditable that so little heed is sometimes paid to the continued and perpetual importance of institutions which form an essential element in the organic life of our government. Courts, at least, are bound to respect what the people have seen fit to preserve by constitutional enactment, until the people are unwise enough to undo their own work. The loss of interest in the preservation of ancient rights is not a very encouraging sign of public spirit or good sense."

This is cited here as apposite, concerning the general ignorance of and indifference to our rights of local self-government and the danger we are in of losing them, through the encroachment thereon by the passage of bills creating state boards and state officers with jurisdiction over towns and cities, but without being accountable to them nor controllable by them, although these officers are to be paid by them, at the dictation of the political machine that may for the time being control the legislature.

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[1] 29 Mich. 343 (1874).

[2] 43 Mich. 76 (1880).

Cooley, J., in People *v.* Hurlbut,[1] says, speaking of the constitution: —

"Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and reënactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages in the abstract."

In Rhode Island, for instance, the constitution declares, Art. VI. sec. 1: "The senate shall consist of the lieutenant-governor and of one senator from each town or city in the state." And Art. V. sec. 1, "Each town or city shall always be entitled to at least one member" (in the House of Representatives).

It is at once apparent that the sweeping principles stated as universal propositions of law, that towns are but creatures of the state and may be governed by the legislature as it pleases, in Barnes *v.* Dist. of Columbia,[2] Merewether *v.* Garrett,[3] and Met. R. Co. *v.* Dist. Col.,[4] all, it will be noticed, subsequent in date to People *v.* Hurlbut (1871), must be limited to the actual cases before the court, and cannot be accepted as stating a universal rule of American law. The influence and authority of the Supreme Court of the United States is weakened by such enunciation of *obiter dicta.*

Robertson *v.* Baxter:[5] In this case *certiorari* was brought to review certain proceedings wherein the respondent, as drain commissioner, undertook to lay out a drain in the line of an old county drain, to build it through four townships, and to assess the cost of construction chiefly on the lands traversed and partly on the townships themselves and on a fifth township, not on the line of the drain, for public benefits at large. The court by Campbell, J., held that under the constitution of Michigan each township is a separate municipality, whose officers are elected by town residents and who are themselves residents. "It has always been understood that in providing, as it does, for the organization and incorporation of townships, the constitution dealt with them as recognized and ancient municipal bodies, the substantial character of which was intended to be perpetuated." The court therefore quashed so much of the proceedings of the drain commissioner as were outside of his own town or township — for the words are synonymous.

[1] 24 Mich. 44, at 87 (1871). [2] 91 U. S. 540 (1875). [3] 102 U. S. 472 (1880).
[4] 132 U. S. 8 (1889). [5] 57 Mich. 127 (1885).

The case of Atty.-Gen. *v.* Detroit [1] turned upon the constitutionality of an act of the legislature providing a board of commissioners of registration and election for the city of Detroit. The act was declared to be entirely invalid because of the illegality of the creation of such a board with the powers conferred upon it by the statute, and particularly because of the illegality of the requirement that the board should be composed of equal numbers of two political parties only. Before arriving at this conclusion the court, by Campbell, J., said: "It is also well settled that our state polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the constitution was adopted." Under this principle it was held to be unlawful to create substantial or serious differences in the fundamental rights of citizens in different localities, in the exercise of their voting franchises.

It is submitted, as a fundamental principle of American constitutional law, that the essential character of towns and cities, as fixed by usage and recognition when the respective state constitutions were adopted, must be preserved by our courts, except when the legislature makes changes therein at the request of the locality or with its consent.

The case of Wilcox *v.* Paddock [2] was upon a petition to quash proceedings for the appointment of a special commissioner under an act of the legislature authorizing such appointment, said commissioner to have power, if in his opinion it is necessary and for the good of the public health that the channel of Maple River, in four townships named, should be improved, to cause a survey to be made and to assess the costs and benefits, subject to the decision of a board of review. These proceedings were declared to be without authority of law, unconstitutional and void, and were therefore quashed, among other reasons, the court, by Morse, J., stating the law complained of "is an encroachment upon the right of local self-government. The taxes are assessed by the commissioner, and, although paid to the township treasurer, are held subject to the orders and disbursements of the commissioner. The act undertakes to wipe out county lines, and confer sovereign authority upon an officer selected by a probate court in another county. The local authorities of Clinton County, or of the township of Essex, have no voice or power in the matter. The whole

[1] 58 Mich. 213 (1885).

[2] 65 Mich. 23 (1887).

theory of the constitution, and of our state polity, before and since its adoption, looks to the imposition of local taxes for local purposes by local officers."

Here is the brief enunciation of a sound principle, the recognition of which by courts will go far to do away with the mischievous principle followed in the past by some courts, that towns and cities have no rights that the legislature is bound to respect.

An act of the legislature of Michigan attempted to extend the powers of the metropolitan police of Detroit over certain townships in Wayne County. In the case of The Board of Metropolitan Police of Detroit *v.* The Board of Auditors of Wayne County,[1] the Supreme Court of Michigan declared this act to be illegal. In the opinion by Campbell, J., the court says, after examining the act in question (p. 581): —

> "The result is that the local board of Detroit draws from the funds of the county to carry on its own work in part of the townships entirely beyond its own jurisdiction, and at the expense as well of the cities and townships where none of this money is spent as of the townships patrolled. We think that no such extension of powers can be granted, and that the attempt to make the grant is illegal."

It would seem from the language used by the court (at p. 579) in speaking of People *v.* Mahaney,[2] that, were the question raised in that case new, a different result might be reached. At any rate, this decision places a limit upon the powers of such a board, and thereby restricts the operation of the decision in People *v.* Mahaney. The dissenting opinion of Sherwood, C. J., is noticeable because of his statement (p. 589) that the constitution is not a grant of powers but a limitation thereof. It is submitted, on the contrary, that every constitution is a grant of powers to stated agencies of government, together with a limitation thereof. See the authorities already quoted.

Upon this review of the Michigan cases on this subject, it is evident this state is definitely committed to the views herein presented as to the inherent right of local self-government of towns and cities.

We come now to those cases in the Supreme Court of the United States that are often cited as authorities to sustain the proposition that towns and cities are the creatures of the state and are therefore subject to its will without limit or control by the courts.

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[1] 68 Mich. 576 (1888).

[2] 13 Mich. 481.

Barnes *v.* Dist. of Columbia:[1] This was a case upon error to the Supreme Court of the District of Columbia, upon an action to recover damages for a personal injury by the plaintiff in consequence of the defective condition of one of the streets of the city of Washington. A verdict for the plaintiff for $3500 was set aside at the general term of the Supreme Court of the District and judgment was ordered for the defendant. A writ of error was brought, and the Supreme Court of the United States reversed the judgment, holding the District liable under the act of Congress of Feburary 21, 1871 (16 Stat. 419), Field and Bradley, Swayne and Strong, JJ., dissenting.

We need not disagree with the decision that the plaintiff was legally entitled to the verdict the jury had found for him, but we must protest against the language used in the decision as *obiter dictum*, unless it is restricted to the case of the District of Columbia that was before the court.

"A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again: it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all of the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action."

It is obvious that this is mere *obiter dictum* unless the language used is limited to the case before the court. All towns and cities in the United States did not originate in the same way, nor have they all the same rights, powers, and duties. To arrive at any general rule concerning them, we must study their different origins and the history and development of each state. Then those states where towns and cities are of like origin and political development may be grouped, and thus we shall get at different classes or kinds of towns and cities, and we can compare these classes with each other, and thus we shall reach different rules for different states. This would involve the same study of the history and political development of each colony or state that has been in these papers

[1] 91 U. S. 540 (1875).

attempted in the case of Rhode Island, but unfortunately time and space are here lacking. It is, however, immediately apparent that the District of Columbia stands in a class all by itself. It was set apart at the time of the adoption of the Constitution of the United States as the seat of the national government, and, without following the successive steps in its government, it was organized as a municipal corporation under the act of Congress of February 21, 1871 (16 Stat. 419), and is the only city of its kind in the country, having had no constitutional development of its own. Probably at the other end of the scale stand the towns and cities of Rhode Island, with their independent origin and self-originated powers and union, with local rights to self-government still preserved, although not always recognized or known by its own citizens. To formulate a general rule as to the status of all municipalities in the United States upon the sole, solitary, and peculiar example of the District of Columbia, regardless of the history of the Anglo-Saxon race, the institution of town government in Germany and in Saxon England, its introduction on this continent by our Puritan forefathers, its development in the New England colonies, its non-development in Virginia and other southern colonies, the conflict between this system and that of the southern colonies still going on in the western territories and states, where the town system of New England is gaining in strength, etc., would be to impute such ignorance to the learned members of the United States Supreme Court as would be unwarrantable and unreasonable. We must therefore limit the application of the principle stated in this opinion to the case actually before the court. Thus limited it amounts to this: the District of Columbia is but a department of the United States, subject to the will of Congress, and is its seat of government, over which Congress is supreme under the Constitution of the United States; under the government thereof provided by the act of Congress of February 21, 1871, the municipality is liable for an injury received through the defective conditions of one of its streets. The case is not an authority for the proposition that all towns and cities are creatures of the legislature and are subject to its unlimited control. That question was not before the court.

It would seem, however, that the writer of this opinion was not familiar with town government in New England, for he says (page 552): "And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi*-corporations

known as counties, towns, school-districts, and especially the townships of New England."

Certainly the classification of New England towns as *quasi*-corporations cannot be defended. Dillon[1] defines municipal corporations as "institutions designed for the local government of towns and cities; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character." "The phrase, 'municipal corporations,' in the contemplation of this treatise, has reference to *incorporated villages, towns and cities*, with power of local administration, as distinguished from other public corporations, such as counties and *quasi*-corporations."[2]

In New England generally, and in Rhode Island in particular, cities are but towns that have increased in population until, owing to the difficulty of carrying on their government under the old form, they have petitioned the legislature for a change from the town form to the city form of government.[3] Both are corporations. So in Massachusetts, cities are but towns with a modified system of government.[4] Towns in the New England colonies have always enjoyed those rights that Stubbs[5] states as the rights of cities in England: "Free election of magistrates, independent exercise of jurisdiction in their own courts and by their own customs, and the direct negotiation of their taxation with the officers of the exchequer."

It will be seen, therefore, that cities, in the New England states at least, did not originate in the manner stated by Goodnow:[6] "The origin of municipal corporations is everywhere the same. It is to be found in the grant to certain sections of the country in which were to be found comparatively large aggregations of people, of a series of privileges."

It was thus that Roman absolutism originated cities. But in the case of Rhode Island, for instance, whose colonial constitutional development has been explained in these papers, it would be more correct to say that a city is a town with some of the rights of its freemen taken away at its own request, and vested in a council, elected by the freemen, because, with increase of population, the old town system of government was becoming unman-

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[1] 1 Mun. Corps. sec. 12.

[2] 1 Dill., Mun. Corps. sec. 22.

[3] 1 Dill., Mun. Corps. sec. 28.

[4] Debates in Conv. 1820, ed. 1853, 125, 192, 193; Warren *v.* Mayor, etc. 2 Gray, 84, at 101 (1854); Hill *v.* Boston, 122 Mass. 344, at 345, 366 (1877).

[5] 1 Const. Hist. of Eng. 628.

[6] 1 Mun. Home Rule, 11.

ageable. Because the boroughs or cities of England are not towns with a changed form of government, we must not forget that is what towns are in New England. In Massachusetts, towns were incorporated in 1785.[1] Nevertheless, they were admittedly corporations even before then. "Towns were of themselves corporations, having perpetual succession, consisting of all persons inhabiting within certain territorial limits."[2] The learned judge was treating of a statute of 1772, and what towns were at that time. This is the construction put upon his language in Hill *v.* Boston[3] by Gray, C. J. In New York, towns and counties were not incorporated until 1829.[4] In Rhode Island, as we have seen, towns have always been corporations.

Mount Pleasant *v.* Beckwith[5] is another decision of the Supreme Court of the United States that is often cited as authority for the proposition that a municipality is the creature of the state and is subject to its will.

In this case it was held that where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the state creating them.

We need not disagree as to this conclusion if we agree upon what constitutes a constitutional restriction. If this eminent court meant that such a restriction must be found in the written constitution only, we cannot agree with them. If they meant, in accordance with the authorities herein cited, that a constitutional restriction may be found in the unwritten constitution as well as in the written constitution, — that the constitution is not wholly written, and therefore part of it is to be found outside the written constitution, — then the decision in this case may be accepted by all.

What was really decided in this case was that where a municipal corporation is legislated out of existence and its territory is annexed to other municipalities, the latter become entitled to all its property and immunities and are severally liable for a proportionate share of all its then existing debts, etc., unless the legislature otherwise provides.

It is true the opinion, at p. 524, uses this language: "Counties, cities, and towns are municipal corporations created by the author-

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[1] 9 Gray, 511, note.

[2] By Shaw, C. J., in Overseers of the Poor of Boston *v.* Sears, 22 Pick. 122, at 130 (1839).

[3] 122 Mass. 344, at 356 (1877).

[4] 2 Wend. 109; 2 Johns. Ch. 320, 325.

[5] 100 U. S. 514 (1879).

ity of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides."

Again, as in the last case, this enunciation of a general principle must be looked upon as *obiter dictum*, unless it be limited to the case actually before the court. That case came from the state of Wisconsin; and it may be a correct statement of the law in that state, but it certainly would not be a correct statement of the law in Rhode Island. We have not time nor space to enter now into an examination of the origin and development of town powers in Wisconsin, as we have in the case of Rhode Island, and therefore we cannot now answer the question thus raised.

Merewether *v.* Garrett:[1] The question in this case was, upon the dissolution of a municipal corporation by the legislature, what property of the defunct municipality is liable for its debts, and how shall it be got at?

Among the propositions of law enunciated by the court in this case are several that are *obiter dicta* if stated as universal propositions of law, but which may be sustained if confined to the particular case before the court.

Thus on p. 501 (2) it is stated that the private property of individuals within the limits of the city whose charter is annulled cannot be subjected to the payment of the debts of the city, except through taxation. It is admitted law to the contrary in the New England states generally.

Page 501 (3) it is stated: "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

But we have seen, in our examination of the history of the towns of Rhode Island, they had that power before they united to form the colony, and they therefore did not derive that power from the legislature. Page 511 states: "The right of the state to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers." With all due respect to this learned and august court, we submit that this is erroneous. Witness the many opinions to the contrary cited in these articles.

[1] 102 U. S. 472 (1880).

So far as the particular case before the court is concerned, it may be that a study of the constitutional history and development of the state of Tennessee would show that this state had a right to repeal the charter of the city of Memphis. No one can pronounce an opinion upon that question without such a study of the history of that state.

But we must emphatically dissent from the rest of the statement quoted, as the correct enunciation of a general principle of law; and we humbly submit that the cases cited, the arguments presented, and the points of constitutional history and development herein submitted, warrant our dissent from such a statement as altogether too general and too sweeping as a statement of a general principle of law. It must be restricted to the particular case before the court.

We must object to such a general statement as that made *obiter dictum* in United States *v.* Railroad Company[1] by Hunt, J., in delivering the opinion of the court: —

"A municipal corporation like the city of Baltimore is a representative not only of the state, but is a portion of its governmental powers. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence."

Certainly no such form of absolutism was ever established by our forefathers in any English colony in this country. As a description of a system of Turkish or Persian absolutism the statement may stand. As a description of a system of government, the outgrowth of the union of autonomous towns, as in Rhode Island and other New England colonies, it is misleading and inaccurate.

Again, in Laramie County *v.* Albany County,[2] in the opinion delivered by Clifford, J., may be found an array of generalities *obiter dicta* that would make it necessary to study the history and development of each colony and state mentioned, before acceptance as the correct statement of a general legal principle. Thus, at p. 308, "they (municipal corporations) are under the entire control of the legislature, from which all their powers are derived." P. 312: "Such corporations are the mere creatures of the legislative will; and inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even

[1] 17 Wall. 322, at 329 (1872). [2] 92 U. S. 307 (1875).

without notice. They are but subdivisions of the state, deriving even their existence from the legislature. Their officers are nothing more than local agents of the state, and their powers may be revoked or enlarged, and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated."

The case in which these broad principles are stated was brought by one county against another county, as the name shows. The question involved turns upon the rights of counties exclusively. To go beyond that, and to lay down a general principle applicable alike to counties, cities, towns, districts, etc., is, of course, *obiter dictum*, — a fault that seems to have infected all these decisions denying the existence of town powers.

We are not called upon to deny that the decision was right in itself in this and in many other cases we are criticising. Probably in the territory of Wyoming, where this case arose, it was correctly decided, because it is probable that there counties have no original powers of their own. They are probably only geographical subdivisions of the state created by the legislature for convenience of administration. But it is a far cry from such mushroom institutions as counties in a territory, with no historical development behind them, to the towns of New England with all that the mere suggestion of their name brings to mind, their Teutonic origin, their growth and development in England, their institution in this country by our forefathers of their own mere motion, without authority of any kind from over the seas, as in the case of the original towns in Rhode Island, their union into a self-instituted colony afterwards a state, etc., etc. To mix these all up, to ignore all distinction, to lay down, in a case not requiring it, a general principle of law as applicable alike to counties, towns, cities, school-districts, etc., is *obiter dictum* of the most objectionable kind. If we follow down the line of these cases, we will constantly find a later case citing as sound law that which was *obiter dictum* in some preceding case, until little by little the law has become in some jurisdictions what it is now generally supposed to be, with regard to the non-existence of town powers. Even the learned and extremely valuable opinion by Gray, C. J., in Hill *v.* City of Boston,[1] is marred by the unquestioned acceptance of the prevalent notion that towns are the creature of the legislature, and are subject to its will. Thus, at p. 380, he speaks of "the doctrine

[1] 122 Mass. 344 (1872).

that the purpose of the creation of municipal corporations by the state is to exercise a part of its powers of government — a doctrine universally recognized, and which has nowhere been more strongly asserted than by the Supreme Court of the United States in the opinions delivered by Mr. Justice Hunt in United States *v.* Railroad Co., 17 Wall. 322, 329, and by Mr. Justice Clifford in Laramie *v.* Albany, 92 U. S. 307, 308."

The learned judge well knew that the right to send representatives to the general court of Massachusetts has been adjudged to be the right of every town in the commonwealth under its constitution, for he cites the case (p. 356) of Warren *v.* Mayor, etc.,[1] reported by himself, in which Shaw, C. J., makes this statement, citing the Const. of Mass. c. 1, § 3, art. 2: . . . "every corporate town containing one hundred and fifty ratable polls may elect one representative."

The last of these cases before the Supreme Court of the United States that we propose to examine is that of Met. Railroad Company *v.* District of Columbia.[1] The District sued the railroad company for work done and materials furnished by the plaintiff in paving certain streets in Washington in 1871, 1872, 1873, 1874, and 1875, in consequence of the neglect to furnish such material and do such work in accordance with its duty as prescribed by its charter. Twelve pleas were filed, the last two being pleas of the statute of limitations. These two were demurred to, issue being joined upon all the others. The court sustained the demurrer and the cause was tried on the other issues, and a verdict was found for the plaintiff. The case was brought to the Supreme Court by writ of error, bringing up for consideration a bill of exceptions taken at the trial and the ruling upon the demurrer. Upon consideration of the demurrer the judgment was reversed, the court holding that the court below erred in supposing the case is founded upon a statute. It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff. We need not differ from the court in its decision of the case, but we must again emphatically dissent from the *dictum* on p. 8 unless limited to the case before the court: "All municipal governments are but agencies of the superior power of the state or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them."

[1] 132 U. S. 1 (1889).

It is a subject for deep regret that this exalted tribunal should thus allow itself to enunciate general propositions of law that are broader than the case before the court or not germane to it. Such *obiter dicta* but impair the reputation of the court and detract from our respect for its judgments.

The State *v.* Covington:[1] In this case the validity of an act of the legislature creating a Board of Police Commissioners and a Board of Health for the city of Cincinnati was affirmed. As usual in acts of this kind, this act appropriated the money and property of the city for the purposes of the act and without the consent of its voters, while the officers appointed were in no wise under the control of the city or of its council. It need only be said once for all that all these acts are of this nature. Indeed, these provisions are the main reason for their passage. If the commissioners appointed under these acts are made subject to the appointment or control of, and are paid by, the city they are appointed to rule over, the real reasons for their appointment are done away with, and the legislature would take no further interest in the passage of these acts.

The point was raised by the relator in this case at p. 107 that a police officer of this kind, whose powers are strictly limited in their exercise to the city, is not a state officer, but is purely a local officer, and that, if he is a state officer, he should be paid by the state; but on p. 114 the opinion denies that such policemen are local officers. At p. 112 the same objectionable statement is to be found that was so often used by the courts at this period: "Cities and villages are agencies of the state government," etc. The common and unquestioned acceptance of this doctrine only shows how low was the state of knowledge at this time of the members of the bench and bar in many states of the constitutional history and development of the various states. For many years the study and attention paid to our federal constitutional development seems to have prevented proper attention to town and state constitutional development.

The argument was presented in this case that prior to the adoption of the existing constitution of Ohio, in 1851, the police of the cities and villages of the state had been elected by the electors thereof, or appointed by authorities elected by them, and therefore as, according to their constitution, "all powers not herein delegated remain with the people," the power to change the ex-

[1] 29 Ohio State, 102 (1876).

isting system was intended to be withdrawn from the general assembly. The opinion says: "To this argument a majority of the court desires to express their unqualified dissent. By such interpretation of the constitution, the body of laws in force at the time of its adoption would have become as permanent and unchangeable as the constitution itself." And why not? Had not the framers so intended, they would have otherwise provided.

It would be necessary to make the same examination of the constitutional development of town and state powers in Ohio as has been made in these papers of the same question in the case of Rhode Island. The result may prove the decision in this case to be well founded, in consequence of that peculiar history and development. But even if such be the case, it would not warrant as a general principle of American law the statement made in the opinion, "Cities and villages are agencies of the state government," etc.

This decision was followed in State *v.* Smith.[1] The members of the local boards under an act in question were to be appointed by the governor, although their duty was clearly only local, "and each member of said board shall personally supervise the cleaning, repairing, and improvements of the streets, alleys, avenues, lanes, public wharves and landings, market houses and spaces, bridges, sewers, drains, ditches, and culverts in one of the districts into which such city may have been or may be divided. Each member was to receive a salary of four thousand dollars a year — rather a high price to pay for supervisors of scavengers, but high enough to make the act an object for the political machine in power, that it might have some good fat "plums" to reward its henchmen with, free from control by the local community — the common object of all these acts. Owen, C. J., in a vigorous dissenting opinion, characterizes the act as "a scheme of conspiracy and fraud, unparalleled in the history of legislation" (p. 382), and Follet, J., concurring in this dissenting opinion, sufficiently shows the rascality of the act. Even the opinion of the majority sufficiently admits the character of the act when it says (p. 374): "Over the wisdom or policy of this legislation this court has no control," citing the language used by Black, J., in Sharpless *v.* Mayor:[2] "There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary," and concluding, "The remedy in such cases is with the people."

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[1] 44 Ohio St. 348 (1886).

[2] 21 Pa. St. 162.

It is remarkable that at this late date (1886) this able court should have found the well-established distinction between the public and the proprietary characters of a municipal corporation to be "illusory and without any well-founded distinction in principle" (p. 373). It is evident the court did not have before it the case of Hill *v.* Boston,[1] in which Gray, J., states, at p. 359, this distinction, and shows beyond peradventure that it cannot be doubted.

"The distinction between acts done by a city in discharge of a public duty, and acts done for what has been called, by way of distinction, its private advantage or emolument, has been clearly pointed out by two eminent judges, while sitting in the supreme courts of their respective states, who have since acquired a wider reputation in the Supreme Court of the Union, and by the present chief justice of England. Nelson, C. J., in Bailey *v.* Mayor, etc. of New York, 3 Hill, 531, 539; Strong, J., in Western Saving Fund Society *v.* Philadelphia, 31 Penn. St. 185, 189; Cockburn, C. J., in Scott *v.* Mayor, etc. of Manchester, 2 H. & N. 204, 210."

This case of The State *v.* Smith[2] sustained the validity of an act of the legislature authorizing the governor to appoint the members of a Board of Public Affairs in cities of the first grade of the first class. The opinion rests upon the provisions of the constitution of Ohio, the previous decisions in the state, and on page 372 the opinion expressly states that it is in the exercise of power expressly delegated by the constitution to the general assembly "that the entire system of municipal government for cities and villages has been created in this state. The entire details of the system that may be devised, and the public agencies that may be employed for administering it, and whether they shall be elected or appointed, is left by the constitution to the wisdom of the legislature."

Whether these findings could be sustained upon a critical examination of the constitutional development of town powers in Ohio would require an examination that cannot be gone into now. Accepting it as the established law in Ohio, let us remember, however, that that does not establish its truth as the statement of a universal principle of American law. Because in Ohio there is no right to local self-government, it does not follow there is no such right in any other state in the Union.

Commenting upon the case of The People *v.* Hurlbut,[3] the opinion says (p. 373): —

"The law was held invalid, not because it violated any express provi-

[1] 122 Mass. 344 (1872). [2] 44 Ohio State, 348 (1886). [3] 24 Mich. 44.

sion of the constitution, for it was admitted that it did not, but because it was thought to contravene certain principles of local self-government, that the court by way of inference regarded as part of their system of government."

The experience of many states since 1886, when this opinion was written, shows that unless our courts do what they can to sustain these principles of local self-government, these rights to local self-government will continue to be gradually lost by the increasing assumption of the power by the legislatures of the various states to wrest them from the towns and cities. This is done by the appointment of boards of all kinds, whose members are appointed by the governor or the legislature, at the dictation of the political machine that may happen to be in power, and are paid large salaries by the particular towns and cities over which they are appointed, but without being subject to their control. Such a system may do in France, but it is not in accord with American principles of government.

Burch *v.* Hardwicke[1] is a case affirming the invalidity of an act of the mayor in removing the chief of police (for cause) instead of suspending him, because he is a state officer and not a local officer, the mayor having power only to suspend him, and not to remove him, as he might were he a city officer. The opinion is clear and able, but contains the objectionable *obiter dicta* statements (p. 32): —

"It must be borne in mind that cities and towns are mere territorial divisions of the state, endowed with corporate powers to aid in the administration of public affairs. They are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the constitution."

Even if an examination of the history and development of Virginia should show this statement to be true as to Virginia, there was nothing in the case that called for so broad a statement. And certainly it is not true as a statement of American law generally.

In the case of Coyle *v.* McIntire[2] it was held that a municipal corporation is merely a revocable agency, instituted by the state for the purpose of carrying out in detail the objects of government, and therefore an act of the legislature establishing a Board of Water Commissioners for the city of Wilmington is constitutional and valid, and the commissioners appointed by the legis-

[1] 30 Gratt. 24 (1878).

[2] 7 Houston (Del.), 44 (1844).

lature under that act may remove the chief engineer appointed by the City Council, and may appoint another in his place.

The argument was briefly presented, pages 53, 54, 65, 67, that municipalities have a right to local self-government, but the history of the subject and the constitutional development of the state were not given in any detail. This argument was lightly dismissed in the opinion (p. 91):—

"The theory of the plaintiff in error, as presented and discussed by his counsel, is a beautiful one. It has all the charm which attaches to the principle of local self-government. Whether the universal recognition by legislative and judicial tribunals as applicable to municipal corporations would be attended by all the advantages, and result in all the beneficial consequences, supposed by its advocates, can only be determined when human experience in this respect, if ever, may safely be invoked as a final arbiter."

This calmly ignores or brushes aside as of no value the whole history of local self-government in the New England and other states, and deprives the opinion of value. It denies also the well-recognized distinction between the public and the private character of municipal corporations (pp. 92–94). On page 96, however, the opinion recognizes the distinction to be well founded, in a supposed case there discussed.

The police power knows no bounds according to this opinion (p. 100): "The police power of a state is great, and may do whatever is necessary to promote the safety and health of a municipality."

Of what avail are the restrictions of any constitution, if they can be swept away at will by the uncontrolled and uncontrollable exercise of the police power thus enlarged in operation? A new clause must be added to our Bills of Rights if this doctrine be law. It may accord with the principles of the Roman law, but it certainly is not in accord with the regard for the rights of the individual that we have imbibed as the foundation of the system of Anglo-Saxon law.

In The State *v.* Hunter[1] the validity of an act providing for a metropolitan police force, to be appointed by the executive council, was affirmed. At page 581 the opinion is made to rest upon the exercise by the legislature of the police power.

Again do we find the same old statement: "Cities are but

[1] 38 Ks. 578 (1888).

agencies of the state, created to aid in the conduct of public affairs."

It may be that in states of mushroom growth, like some of our western states, their political history and political development can show no such a system of town powers, and of evolution of state powers from town powers, as can be shown in Rhode Island and in other New England states. But the report of this case does not show that any such examination of the history and development of Kansas was presented to the court. Unless limited to the state of Kansas, the case actually before the court, it is submitted that the principle so broadly stated by the court is not one of universal application.

Even a text-book of such recognized excellence as Angell & Ames on Corps.[1] makes the unqualified statement: "The legislature has absolute control over municipal corporations, to create, modify, or to destroy them at pleasure," and cites a string of authorities in support of this doctrine, not one of which is a decision in any New England state. But uniformity in state constitutional law is not possible under a union of states with different constitutional developments such as our states have had, and it is time the text-book writers, the bar, and the courts should recognize this fact. Indeed, nothing but ignorance of this local constitutional development, unlike in different states, can account for the decisions made a hundred years ago, when the documentary evidence of early town powers was not yet in print. It is, however, most unfortunate that these decisions should have been followed afterwards when we became provided with the means of knowing they were erroneous. But *obiter dicta* upon *obiter dicta*, even to the *n*th power, cannot establish as a sound principle of law that which is essentially unsound.

Amasa M. Eaton.

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[1] 10th ed. 22, note 3.

[To be continued.]